

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2014-346-WS

IN RE:)	DIUC RESPONSE TO ORS
)	PROPOSED ORDER ON
Application of Daufuskie Island Utility)	MOTION TO COMPEL
Company, Inc. for Approval of an)	
Increase for Water and Sewer Rates,)	
Terms and Conditions)	
_____)	

Daufuskie Island Utility, Inc. (“DIUC”) hereby submits this Response to the Proposed Order Granting Motion to Compel filed by the South Carolina Office of Regulatory Staff (“ORS”) on October 15, 2020 (“Proposed Order”). As set forth herein, the Proposed Order should not be entered as presented.¹

I.

The Proposed Order improperly includes the ORS mischaracterization that DIUC only seeks to recover \$269,356 in rate case expenses. In doing so repeatedly throughout the Proposed Order, ORS attempts to have the Commission find and rule before the hearing that the maximum amount DIUC can recover for rate case expenses is \$269,356. Such a finding is unsupported and is procedurally improper.

First, ORS knows DIUC is seeking \$542,978 in rate case expenses, because that is the amount DIUC has been presenting to the Commission for years in this proceeding. *See, e.g.*, Rehearing Rebuttal Testimony of John F. Guastella, November 29, 2017 (stating the rate case expenses “sought herein total \$542,978 and are made up of GA’s monthly charges all the way back to when GA undertook the very first preparations of the rate application.”). This amount of \$542,978 has been included in prefiled rehearing testimony, live rehearing testimony, DIUC’s

¹ DIUC remains opposed to the Motion and would respectfully ask that the Commission reconsider its decision. Recognizing that may not occur, DIUC provides this Response to the Proposed Order pursuant to Order 2020-700. The lack of a reference herein to any specific provision of the Proposed Order is not intended to indicate that DIUC agrees with or consents to the same.

brief on the second appeal to the Supreme Court, DIUC's reply brief on the second appeal to the Supreme Court, discussed at length before the Supreme Court at oral argument (<http://media.sccourts.org/videos/2018-001107.mp4>), included in DIUC's briefings to the Commission addressing the scope of this second remand, and discussed at length at the recent oral argument. *See, infra*, at pp. 3 to 4 (discussing counsel's statements at the oral argument).

ORS is again playing some sort of "gotcha" game by isolating one piece of John Guastella's Second Rehearing Direct Testimony² and then taking it out of context to try to obtain a ruling from this Commission that DIUC only seeks \$269,356 in rate case expenses. More specifically, ORS seeks to obtain a ruling that DIUC is limited to \$269,356 in rate case expenses and that DIUC cannot ask this Commission for \$542,978 in rate case expenses during the upcoming hearing. The Proposed Order's references—both stated and implied—that \$269,356 is "the amount DIUC seeks in this rehearing" should not be included in an order of the Commission on the Motion to Compel, because it is not correct.

The only basis for the ORS assertion that DIUC only seeks \$269,356 in rate case expenses (or, more accurately stated, the ORS request that DIUC be limited to a maximum of \$269,356 in rate case expenses) is two lines from prefiled testimony that ORS has isolated from three years of proceedings. In doing so, ORS is again attempting to involve the Commission in some sort of "gotcha" game. By hyper-focusing on one piece of John Guastella's Second Rehearing Direct Testimony and then taking it completely out of all context, ORS is trying to obtain a pre-hearing ruling from this Commission that DIUC only seeks \$269,356 in rate case expenses and therefore

² John Guastella's Second Rehearing Direct Testimony was prefiled on June 16, 2020. Via Commission Order No. 2020-496, entered July 22, 2020, all remaining procedural dates in this Docket, including the prefiling and hearing dates, were held in abeyance until further Order of the Commission. Accordingly, DIUC has not submitted its prefiled Rebuttal Testimony which, combined with the Second Rehearing Direct Testimony prefiled on June 16, 2020, would be the complete set of DIUC's prefiled testimony for the Second Rehearing. Live testimony at the hearing would also be provided.

DIUC is limited to a maximum amount of \$269,356 for rate case expenses. Again, ORS knows DIUC is seeking \$542,978 in rate case expenses, because that is the amount DIUC has been presenting to the Commission for years.

Even if ORS somehow misunderstood the most recently prefiled testimony of Mr. Guastella and somehow was unable to recall all the many instances since 2017 wherein DIUC has been clear and specific about the fact that it seeks \$542,978 in rate case expenses, counsel for DIUC unequivocally stated in the recent oral argument (as noted by the Proposed Order) that DIUC seeks \$542,978, and not just \$269,356. The Proposed Order even quotes from the transcript, stating: ***“During the Oral Arguments held on October 8, 2020, Counsel for DIUC asserted the Company seeks Commission approval for the total sum of \$542,978 in GA invoices.”*** Proposed Order at footnote 2 (citing Oral Argument Tr. p 49, ll. 8-18)(double emphasis added).

The Proposed Order cites but then disregards this statement by DIUC’s counsel at the oral argument. At oral argument counsel for DIUC also explained:

1 The 269 is our best estimate of what might
 2 happen when the final calculations are done, based
 3 on a Commission order that says, “We agree with
 4 you, DIUC, on the 699. We agree with you, DIUC, on
 5 the 542. You should be able to recover that.
 6 However, there is a cap because of what you
 7 advertised. Some portion of those rates are going
 8 to have to carry over, and let’s figure out which
 9 ones they are.” And this is where 269 comes from,
 10 our best estimate of what we think would happen at
 11 that time. It may be 268, it may be 270.
 12 So we’re not planning to put up proof limited
 13 to 269. We’re going to put in the full 542 and
 14 we’re going to ask for it. And then this
 15 calculation about 269 only comes into play if the
 16 rates, through that large spreadsheet calculation,

17 results in more than what was advertised, and then
 18 something has to be changed.

Oral Argument Tr. p 66, lines 1 to 18.

Again, ORS's goal is to have this Commission make a ruling that DIUC is only seeking \$269,356 and therefore only entitled to \$269,356 in rate case expenses. The Proposed Order is filled with "findings" for the Commission to adopt so that ORS can rely on them in future. Some examples are:

Page 2: "the \$269,356, which the Company seeks recovery from ratepayers on remand and in this proceeding";

Page 2: "the \$269,356 that DIUC seeks to recover as rate case expenses";

Page 3: "the individual GA invoices that comprise the requested \$269,356";

Page 4: "its request to recover \$269,356 from ratepayers";

Page 5: "the amount of \$269,356 for which DIUC seeks recovery on remand and in this proceeding";

Page 5: "the \$269,356 sought by DIUC on remand and in this proceeding"; and

Page 6: "request for recovery of \$269,326 on remand and in this proceeding".

See Proposed Order at pp.2 to 6. The purpose of these multiple references and proposed explicit and implicit findings is not concealed; ORS wants DIUC limited to recovering a maximum of only \$269,326 in GA rate case expenses in this proceeding and ORS wants the Commission to make that finding now in the context of this Motion to Compel.

However, ORS is not entitled to ask the Commission to enter rulings halfway through a rate proceeding before DIUC has even submitted all its evidence. If the Commission's order on the Motion to Compel does include any finding(s) that DIUC is only requesting \$269,356 in rate case expenses as ORS seeks, then DIUC will have been denied due process in addition to its constitutional right to earn a fair and reasonable return on its investment. *See Utils. Servs. of S.C.*

v. S.C. Office of Regulatory Staff, 392 S.C. 96, 107 n.8, 708 S.E.2d 755, 761 (2011) (citing *Bluefield Waterworks & Improvement Co. v. Public Service Comm'n of W. Va.*, 262 U.S. 679, 690, 43 S.Ct. 675 (1923) (explaining that where the rates charged by a public utility company “are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service . . . their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment”)). It is simply improper for ORS to attempt to manipulate and limit the record in this proceeding in this manner.

If it were true that Guastella’s prefiled Second Rehearing Direct Testimony, filed June 16, 2020, was somehow incomplete and could be plausibly read to limit DIUC to seeking \$269,356 instead of \$542,978, the Commission should not be ruling on Guastella’s prefiled Second Rehearing Direct Testimony as if it is evidence. That testimony has not been admitted as evidence. When the pending stay of this matter is lifted, DIUC is still entitled to submit Mr. Guastella’s rebuttal testimony which will address this issue and make certain there is no confusion that DIUC seeks \$542,978 in rate case expenses, not just \$269,356.

II.

The Proposed Order’s provision #2 is ORS’s attempt to have this Commission pre-rule on the standard to be applied to review GA invoices for inclusion as rate case expense. Further, it seeks an order of the Commission requiring DIUC to submit to a standard of review that is stricter than what ORS applied previously.

In Item #2, the second enumerated provision of its Proposed Order, ORS attempts to gain a pre-hearing ruling by the Commission that ORS is entitled to apply a stricter standard of review to the GA invoices than was applied at the original hearing. Adopting these provisions of the Proposed Order will again mean that “DIUC's evidence [has been] subjected to a retaliatory, higher standard of scrutiny on remand.” *Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff*, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019), *reh'g denied* (Sept. 27, 2019).

Contrary to the Proposed Order's provisions, the Commission cannot demand more documentation and evidence (ie, employ a "harsher treatment of the *same* invoices on remand") without violating the Supreme Court's explicit prohibition of employing a retaliatory standard of scrutiny. *Id.* at 463, 574.

ORS wants the Commission to order that DIUC must provide additional proof, prepare narrative explanations, and create additional documents to supplement the GA rate case invoices. Specifically, Item #2 of the Proposed Order would impose the following:

2. DIUC must provide any other appropriate related materials as may be requested by ORS including, but not limited to, complete responses to ORS for any requests for follow-up information that may serve to support the individual invoices for which DIUC seeks recovery in this contested proceeding.
 - a. DIUC must provide detailed descriptions of the invoices including, but not limited to, the business purpose of the work performed; the dates and hours of the work described; and the name of the employee that performed the work.
 - b. If an invoice includes travel expenses, DIUC must provide supporting documentation for travel expenses including, but not limited to, business purpose, name of employee, and receipts for all expenses.

Item #2, Proposed Order at 6.

ORS is not entitled to an order of such breadth when the Motion to Compel was by its terms limited to a request for "an order compelling Daufuskie Island Utility Company, Inc. ("DIUC") to respond to Request 1-1 of ORS's First Continuing Request for Production of the Second Remand." Motion to Compel at 1. The Motion was limited in scope, as also evidenced by the relief the Motion requested in stating, "ORS respectfully moves that the Commission issue an order compelling DIUC to fulfil its regulatory obligations by cooperating and fully responding to Request 1-1 of ORS's First Continuing Request for Production of the Second Remand." Motion to Compel at 5.

ORS did not seek the relief included in Item #2 of the Proposed Order. DIUC was not able to respond to a request for such relief. That relief is not properly before the Commission and the issues involved have not been briefed or presented to the Commission. Accordingly, the Commission should not enter the Proposed Order's Item #2.

Including these provisions of the Proposed Order would also be an untimely and improper ruling that the GA invoices are insufficient and require supplementation. By requiring additional documentation and narrative information, entry of the Proposed Order would be a Commission endorsement of ORS's plan to again apply a stricter standard to the invoices than the standard ORS applied in the initial proceeding. That is not lawful.

ORS is asking the Commission to endorse what the Supreme Court explicitly rejected in the most recent appeal when the Court ruled as follows:

[I]n contrast to the commission's assessment of the invoices in its order after the initial hearing, the commission heavily scrutinized the format of the Guastella invoices on remand. The commission's order on remand provides, "The Commission agrees with ORS.... The evidence shows that a large sum of what DIUC seeks was based on invoices that could not be verified." The commission's order denying DIUC's motion for reconsideration also provides, "ORS ... completed a thorough review of all invoices from Guastella Associates, and found that they 'contained mathematical errors, lacked sufficient detail, and/or did not appear to be paid.'" However, the commission expressed these concerns with the invoices only in its evaluation on remand. ***The commission's harsher treatment of the same invoices on remand—of which rate case expenses were previously awarded—convinces us the commission itself employed a retaliatory standard of scrutiny.***

Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff, 427 S.C. 458, 462–63, 832 S.E.2d 572, 574 (2019), *reh'g denied* (Sept. 27, 2019) (double emphasis added).

The Supreme Court was clear and the portion of the Proposed Order in the enumerated Item #2 should not be included in any order of the Commission.

III.

If the Commission wishes to grant the Motion to Compel, the order doing so should only include language that is fair and does not impermissibly limit or otherwise impact DIUC's ability to pursue its Application.

By its own terms, the ORS Motion to Compel only sought "an order compelling Daufuskie Island Utility Company, Inc. ("DIUC") to respond to Request 1-1 of ORS's First Continuing Request for Production of the Second Remand." Motion at 1. All the other extraneous matters and findings included in the Proposed Order are beyond the relief requested. Accordingly, a Commission order granting the Motion to Compel should likewise be limited.

To assist the Commission, attached hereto as *Exhibit A* is DIUC's Proposed Order Granting Motion to Compel, which DIUC encourages the Commission to enter as provided.

Respectfully submitted,

/s/ Thomas P. Gressette Jr.

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October 19, 2020
Charleston, South Carolina

Attachments:

Exhibit A – DIUC's Proposed Order Granting Motion to Compel

CERTIFICATE OF SERVICE

This is to certify that on October 19, 2020, I caused to be served upon the counsel of record named below a copy of the foregoing **DIUC RESPONSE TO ORS PROPOSED ORDER ON MOTION TO COMPEL WITH EXHIBIT A** via electronic mail, as indicated. A copy of the Response was also filed via the Commission's DMS.

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